

STATE OF MICHIGAN  
COURT OF APPEALS

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UNPUBLISHED  
November 16, 2010

In the Matter of SCHOOLER, Minors.

No. 297747  
Mecosta Circuit Court  
Family Division  
LC No. 09-005394-NA

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Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

PER CURIAM.

Respondent father appeals as of right the order terminating his parental rights to his minor children under MCL 712A.19b(3)(c)(i), (g), (h), and (j). Because we conclude that the trial court erred in terminating respondent's parental rights without providing him with the opportunity to meaningfully participate in the termination proceedings and a case service plan, we reverse and remand.

A parent's right to the care and custody of his children is an element of liberty protected by due process. See *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982); *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). This includes the right to procedural due process before his parental rights are terminated. *In re Rood*, 483 Mich 73, 118-119; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.). Parents retain their right to procedural due process even though they might not be model parents. *Santosky*, 455 US at 753.

In *In re Mason*, 486 Mich 142, 154; 782 NW2d 747 (2010), the Court held that MCR 2.004 requires the lower court to offer an incarcerated respondent an opportunity to participate in each proceeding in a child protective action by telephone. The Court there determined that the respondent had not been afforded the minimum process provided under MCR 2.004 even though the respondent participated in the pretrial, permanency planning hearing, and termination hearing. *Mason*, 486 Mich at 153-155. In the present case, respondent similarly participated in the termination hearing in person, participated by telephone during the last part of the first permanency planning hearing, and spoke to his attorney before some other proceedings, but that participation was insufficient to satisfy the requirements of MCR 2.004. See *Mason*, 486 Mich at 154-155; see also *In re Kleyla*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (2010). The lower court could not grant the relief petitioner requested without providing respondent with a full opportunity to participate as provided under MCR 2.004. *Mason*, 486 Mich at 155 (stating that, because the respondent was not offered the opportunity to participate in the proceedings under MCR 2.004, "the court was precluded from granting the relief requested by the moving party at the close of the review period—specifically, the DHS's request for termination of respondent's

parental rights.”). Although respondent did not specifically raise this issue in the lower court, we nevertheless conclude that the failure to provide respondent with the opportunity to participate was plain error affecting respondent’s substantial rights. *In re Williams*, 286 Mich App 253, 274; 779 NW2d 286 (2009).

Respondent also argues that petitioner failed to provide reasonable services and the lower court terminated his rights based solely on his incarceration and failure to participate in services not available to him. Petitioner generally must make reasonable efforts to rectify the respondent’s problems through a service plan. See *In re Fried*, 266 Mich App 535, 542; 702 NW2d 192 (2005). And petitioner must still make reasonable efforts even when the respondent is incarcerated. *Mason*, 486 Mich at 152. The failure to make reasonable efforts can affect whether there was sufficient evidence to terminate parental rights. *Rood*, 483 Mich at 89 (opinion by CORRIGAN, J.). A respondent is denied reasonable services when the caseworker and the lower court do not facilitate the respondent’s access to services. *Mason*, 486 Mich at 157-158.

In the present case, the court ordered respondent to participate in services petitioner believed were available in the prison where he was incarcerated, based on the Department of Corrections website. However, petitioner provided no evidence that any services were available to respondent, other than the substance abuse treatment for which he was on the waiting list. The lower court ordered respondent to undergo parenting classes only at the convenience of the Department of Corrections, and respondent was not moved to a facility that offered the classes as he expected. It was clear error to terminate respondent’s parental rights solely because he was incarcerated for a non-violent crime, with a possible release date in less than two years, and where he failed to participate in a service plan that he could not participate in while incarcerated. See *id.* at 159. Petitioner and the lower court also made no reasonable efforts to evaluate respondent’s ability to provide for the children in the future. *Id.* at 159-160.

Respondent argues further that he could have provided proper care and custody during his incarceration if the children were placed with his wife. Placement with an appropriate relative during incarceration can constitute proper care and custody. *Mason*, 486 Mich at 163-164. Although a stepmother could be considered a relative, these children had no contact with respondent’s wife, who married him after the children were removed and long after he was incarcerated. And she never acted as their stepmother. Petitioner should have evaluated her appropriateness for temporary custody, see MCL 722.954a(2), but was not required to place the children with her.

The trial court clearly erred in terminating respondent’s parental rights; respondent was not afforded a meaningful opportunity to participate in the proceedings or a case service plan and, for that reason, termination was premature. *In re Mason*, 486 Mich at 169. On remand, the trial court and DHS shall provide respondent with the opportunity to participate in each stage of the termination proceedings under MCR 2.004, with a meaningful opportunity to participate in a case service plan, and shall evaluate his present and future ability to provide proper care and custody either in person or through placement with a relative.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly  
/s/ Kirsten Frank Kelly  
/s/ Stephen L. Borrello